Supreme Court, U.S.
FILED
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No. 10-596

In The

Supreme Court of the United States

FAYE COFFIELD, et al.,

Petitioners,

v.

BRIAN KEMP, in his Official Capacity as Georgia Secretary of State and Chairperson of the Georgia State Election Board,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRITT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit erred in declining to rule that Georgia's 5% petitioning requirement for non-major party candidates for the United States House of Representatives is unconstitutionally burdensome, given that no such candidate has met the requirement since 1964 and no minor party candidate has ever met it.

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The decision of the court of appeals is reported at 599 F.3d 1276 and is reproduced in the Appendix at 1-3. The decision of the district court is not reported and is reproduced in the Appendix at 6-8.

JURISDICTION

The decision and judgment of the court of appeals were entered on March 19, 2010. An order denying petitioners' timely petitions for rehearing and for rehearing en banc was entered on August 4, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Ga. Code Ann. § 21-2-170(b)

> A nomination petition of a candidate seeking an office which is voted upon state wide shall be signed by a number of voters equal to 1 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. A nomination petition of a candidate for any other office shall be signed by a number of voters equal to 5 percent of the total number of registered voters eligible to vote in the last election for the filling of the office the candidate is

seeking and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected. However, in the case of a candidate seeking an office for which there has never been an election or seeking an office in a newly constituted constituency, the percentage figure shall be computed on the total number of registered voters in the constituency who would have been qualified to vote for such office had the election been held at the last general election and the signers of such petition shall be registered and eligible to vote in the election at which such candidate seeks to be elected.

STATEMENT

This case questions the continuing validity of *Jenness v. Fortson*, 403 U.S. 431 (1971), in which this Court upheld a Georgia ballot access requirement that a non-major party candidate for public office submit a nomination petition containing signatures equal to five percent of the number of voters qualified to vote for the office in the preceding election (the "5%" requirement).

Petitioner Coffield sought access to the ballot for the November 4, 2008 general election as an independent candidate for the United States House of Representatives from Georgia's fourth congressional district. District Court Document No. ("Doc") 14, Att 1, ¶ 1. The petitioners and others began circulating Coffield's nomination petition in April, 2008. *Id.*, ¶ 2.

On or about July 5, 2008 they tendered some 2,000 signatures to the respondent's representatives, who refused to accept them on the ground that the petition contained fewer signatures than " . . . 5 percent of the total number of registered voters eligible to vote in the last election for the filiing of the office the candidate is seeking. . . ." *Id.*, ¶¶ 4, 5; Ga. Code Ann. § 21-2-170(b). Coffield was denied access to the November 2008 ballot. On August 29, 2008, petitioners filed an action in the district court pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief. Doc 1. Federal jurisdiction was predicated on 28 U.S.C. §§ 1331 and 1343.

For 2008 the 5% requirement was 15,061 signatures in Georgia's fourth congressional district. *Id.*, ¶ 6.[1] Petitioners presented the courts below with historical and comparative data, unavailable to this Court in *Jenness v. Fortson, supra*, showing that no independent candidate for the United States House of Representatives had met the 5% requirement since 1964, *id.*, ¶ 13; that no minor party candidate for the United States House of Representatives had ever met the 5% requirement, *id.*, ¶ 14; that no independent candidate for the United States House of Representatives in any state had ever met a petition requirement

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[1] In the November 2010 election the number of petition signatures required to obtain access to the ballot for an independent candidate for the United States House of Representatives from Georgia's fourth congressional district was 18,032. *Id.*, ¶ 8.

greater than 12,919 signatures, *id.*, ¶ 8; that Georgia is one of only two states which require an independent candidate for the United States House of Representatives to obtain signatures exceeding three percent of the registered voters in the district in question, *id.*, ¶¶ 11, 12; that in 2008 the nationwide median signature requirement for independent candidates for the United States House of Representatives was 2,750, and that the requirement was less than 5,000 in 318 congressional districts, between 5,000 and 9,999 in 62 districts, and 10,000 or more in only 55 districts, including all of Georgia's districts, *id.*, ¶ 15.

Notwithstanding this empirical data, the district court ruled that the petitioners were foreclosed by *Jenness* and additionally cited *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002) (also upholding the 5% requirement) and *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007) (upholding Alabama's 3% requirement). Doc 30 at 1-2. The court of appeals affirmed the district court, also citing *Jenness*, *Cartwright* and *Swanson*.

REASONS FOR GRANTING THE PETITION

In *Jenness*, this Court stated that "Georgia's election laws . . . do not operate to freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution." *Jenness* at 438. However, subsequent

experience has shown that the 5% requirement is too difficult a burden for candidates to overcome with any regularity.

The decisions of the courts below are inconsistent with relevant decisions of this Court since *Jenness*. The court of appeals' opinion provides in its entirety as follows:

> Appellant-Plaintiff Coffield sought access to the 2008 general election ballot as an independent candidate to represent Georgia's Fourth Congressional District in the United States House of Representatives. She was not on the ballot. Briefly stated, she was unable to collect a sufficient number of signatures to satisfy Georgia's requirement that an independent candidate submit a nomination petition signed by at least 5% of the total number of registered voters eligible to vote in the last election for the position the candidate seeks. Ga. Code Ann. § 21-2-170. This appeal presents one issue: whether the district court erred when it dismissed Coffield's constitutional challenge for failure to state a claim under Rule 12(b)(6). We conclude it did not.
>
> Coffield claims that Georgia's 5% rule is too burdensome; she alleges no independent candidate for the House of Representatives in Georgia has met the requirement since 1964 and that no minor party candidate has ever met it. *But she does not allege how many candidates have tried.* According to the Complaint, Coffield's own petitioning effort resulted in about 2000 signatures, less than 1% of the eligible pool and about 13,000 signatures short of what the rule required.

> *Our Court and the Supreme Court have upheld Georgia's 5% rule before. See Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 1974-76 (1971) (stressing lack of restrictions on write-in candidates and on the obtaining of signatures for nominating petitions); *Cartwright v. Barnes*, 304 F.3d 1138, 1140-42 (11th Cir. 2002); *see also Swanson v. Worley*, 490 F.3d 894, 910 (11th Cir. 2007) (upholding Alabama's 3% requirement where no independent or minor party candidate had obtained ballot access when nothing indicated that similar potential candidates had sought ballot access). *The pertinent laws of Georgia have not changed materially since the decisions in Jenness and Cartwright were made.*
>
> AFFIRMED.

(Emphasis added.)

Thus, the Eleventh Circuit's decision was grounded in three considerations: First, Coffield did not allege how many candidates have tried to meet the 5% requirement. Second, the Eleventh Circuit and this Court have previously upheld the 5% requirement. Third, the pertinent laws have not changed materially since the Eleventh Circuit and this Court upheld the 5% requirement.

None of these considerations support the Eleventh Circuit's decision. First, it was impossible for Coffield to have alleged how many candidates have tried to meet the 5% requirement. There is no registry of candidates who have tried to meet the requirement and failed. Such candidates need not report their

attempts or their failures. It is hardly surprising that this Court has not directed us to examine failed petitioning efforts; it has instead exhorted us to examine successful efforts. *See Storer v. Brown*, 415 U.S. 724, 738, 742 (1974); *Mandel v. Bradley*, 432 U.S. 173, 177-78 (1977); *Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S.Ct. 1610, 1624-25 (2008) (Scalia, J. concurring in the judgment, joined by Thomas and Alito, JJ.). The Eleventh Circuit grounded its decision on Coffield's failure to allege information which does not exist and cannot be obtained.

Second, neither this Court in *Jenness* nor the Eleventh Circuit in *Cartwright v. Barnes, supra*, were presented with information about how many candidates have actually succeeded in meeting the 5% requirement. In *Storer v. Brown*, *supra* at 738, 742, decided three years after *Jenness*, this Court emphasized the importance of considering such information in determining whether a signature requirement is unconstitutionally burdensome:

> . . . [California's 5% petition requirement], as such, does not appear to be excessive, see Jenness v. Fortson, supra, but to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case.
>
> * * *

> [O]nce [such critical facts are ascertained], there will arise the inevitable question for judgment: *. . . could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.* We note here that the State mentions only one instance of an independent candidate's qualifying for any office under [the statute in question], but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter.

(Emphasis added).

Unlike the parties in *Jenness*, *Cartwright v. Barnes* and *Storer v. Brown*, the petitioners made a comprehensive survey of the historical record. It demonstrates that Georgia's 5% requirement *does* "operate to freeze the political status quo," *Jenness* at 438. Independent candidates for the United States House of Representatives have not qualified for the ballot in Georgia with any regularity and will only rarely, if ever, satisfy the 5% signature requirement and succeed in accessing the ballot.

Third, while it is true that the pertinent laws have not changed materially since *Jenness* and *Cartwright* were decided, what has changed is the availability of historical information about the frequency

with which independent and minor party congressional candidates have met the 5% requirement. This information is summarized above and was presented to the lower courts. Such information had apparently never before been proffered to those courts. In declining to consider it, the lower courts disregarded this Court's admonishment in *Storer v. Brown*, *supra*, that "it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not."

This Court has described a reviewing court's task in evaluating a constitutional challenge to a state-imposed restriction on access to the ballot as follows:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged [restriction] is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

The injury caused by Georgia's 5% requirement is clear, and severe, viz, almost-certain foreclosure from access to the ballot. The state interests advanced by

respondent in justification were: "requir[ing] a preliminary showing of a 'significant modicum of support' before a candidate or party may appear on the ballot," Brief of Appellee at 5; "regulating [the state's] election process," *id.* at 8; "maintaining fairness, honesty, and order," *id.*; "minimizing frivolous candidacies," *id*; and "'avoiding confusion, deception, and even frustration of the democratic process,'" *id.* Left unanswered was the question of how any of these wholly legitimate state interests are served by a signature requirement that candidates are unable to meet. Under *Anderson v. Celebrezze*, *supra*, and its progeny, the courts below were required not only to determine the legitimacy and strength of the interests asserted by the state to justify its ballot access restrictions, but also to "consider the extent to which those interests make it necessary to burden the plaintiff's rights."

The courts below asserted that the present case is foreclosed by *Jenness*. Yet the Eleventh Circuit itself has recognized that "the . . . cases which have upheld the Georgia provisions against constitutional attack by prospective candidates and minor political parties do not foreclose the parties' right to present the evidence necessary to undertake the balancing approach outlined in *Anderson v. Celebrezze*." *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985). In that case the Eleventh Circuit noted that in *Mandel v. Bradley*, *supra*, "the [Supreme] Court reviewed a three-judge court's decision that prior precedents . . . rendered unconstitutional *per se*

provisions of the Maryland election laws. . . ." and that "[t]he Supreme Court reversed, instructing the district court to take evidence and apply constitutional standards announced by the Court in earlier cases." *Id.* at 1555. The Eleventh Circuit then noted that in "weigh[ing] the precise interests advanced by the State as justifications for the burdens imposed by its rules," the district court "may analyze the past experience of minor party and independent candidates in Georgia as an indication of the burden imposed on those who seek ballot access," *id.*, citing *Mandel v. Bradley, supra*, at 178.

In the present case, neither of the courts below undertook any such analysis. Neither court seriously engaged the petitioners' demonstration that candidates have not succeeded in meeting Georgia's 5% signature requirement. Petitioners argue (and have shown) that Georgia law has long had a profoundly restrictive impact, of which the courts apparently have not been aware because they have never before been presented with the information that the petitioners in this case have provided. Petitioners urge that in light of the historical and comparative data they have adduced, Georgia's 5% requirement cannot survive any standard of review on the continuum from rational basis analysis to strict scrutiny. They submit that the 5% requirement effectively precludes independent candidates from running for the United States House of Representatives, thereby unnecessarily burdening the availability of political opportunity to

such candidates and to the electorate. For that reason, the 5% requirement is unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-13277

D. C. Docket No. 08-02755-CV-RLV-1

FAYE COFFIELD,
JASON CROWDER,
BEATRICE WILLIAMS,

Plaintiffs-Appellants,

versus

BRIAN KEMP,
in his official capacity as Georgia
Secretary of State and Chairperson of
the Georgia State Election Board,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(March 19, 2010)

Before EDMONDSON and MARCUS, Circuit Judges, and BARBOUR,* District Judge.

PER CURIAM:

Appellant-Plaintiff Coffield sought access to the 2008 general election ballot as an independent candidate to represent Georgia's Fourth Congressional District in the United States House of Representatives. She was not on the ballot. Briefly stated, she was unable to collect a sufficient number of signatures to satisfy Georgia's requirement that an independent candidate submit a nomination petition signed by at least 5% of the total number of registered voters eligible to vote in the last election for the position the candidate seeks. GA. CODE ANN. § 21-2-170. This appeal presents one issue: whether the district court erred when it dismissed Coffield's constitutional challenge for failure to state a claim under Rule 12(b)(6). We conclude it did not.

Coffield claims that Georgia's 5% rule is too burdensome; she alleges no independent candidate for the House of Representations in Georgia has met the requirement since 1964 and that no minor party candidate has ever met it. But she does not allege how many candidates have tried. According to the Complaint, Coffield's own petitioning effort resulted in about 2000 signatures, less than 1% of the eligible

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* Honorable William Henry Barbour, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

pool and about 13,000 signatures short of what the rule required.

Our Court and the Supreme Court have upheld Georgia's 5% rule before. *See Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 1974-76 (1971) (stressing lack of restrictions on write-in candidates and on the obtaining of signatures for nominating petitions); *Cartwright v. Barnes*, 304 F.3d 1138, 1140-42 (11th Cir. 2002); *see also Swanson v. Worley*, 490 F.3d 894, 910 (11th Cir. 2007) (upholding Alabama's 3% requirement where no independent or minor party candidate had obtained ballot access when nothing indicated that similar potential candidates had sought ballot access). The pertinent laws of Georgia have not changed materially since the decisions in *Jenness* and *Cartwright* were made.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 09-13277

District Court Docket No.
08-02755-CV-RLV-1

FAYE COFFIELD,
JASON CROWDER,
BEATRICE WILLIAMS,

Plaintiffs-Appellants,

versus

KAREN C. HANDEL,
in her official capacity as Georgia
Secretary of State and Chairperson of
the Georgia State Election Board,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

(Filed Mar. 19, 2010)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: March 19, 2010
For the Court: John Ley, Clerk
By: Gilman, Nancy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAYE COFFIELD, JASON CROWDER, and BEATRICE WILLIAMS, Plaintiffs,	CIVIL ACTION
v.	NO. 1:08-CV-2755-RLV
KAREN C. HANDEL, in her official capacity as Georgia Secretary of State and Chairperson of the Georgia State Election Board, Defendant.	

ORDER

(Filed May 26, 2009)

This is an action for declaratory judgment and injunctive relief wherein the plaintiffs challenge the constitutionality of O.C.G.A. § 21-2-170(b), which requires that an independent candidate for a congressional seat submit a petition containing the signatures of at least five percent of the total number of registered voters in the previous election in order to be included on the ballot. Pending before the court are the defendant's motion to dismiss [Doc. No. 3] and the plaintiffs' motion for summary judgment [Doc. No. 14].

The plaintiffs' case is foreclosed by Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970 (1971), in which the Supreme Court specifically upheld the five percent requirement of this code section. More recently, the Court of Appeals for the Eleventh Circuit upheld this identical provision in Cartwright v. Barnes, 304 F.3d 1138 (11th Cir. 2002). See also Swanson v. Worley, 490 F.3d 894 (11th Cir. 2007) (upholding Alabama's three percent requirement and citing *Jenness* and *Cartwright*).

In Swanson, the Eleventh Circuit noted that it had rejected a strict scrutiny analysis in determining the constitutionality of a percentage signature requirement. In their complaint, the plaintiffs suggest that the Supreme Court has now mandated a strict scrutiny analysis in such cases, citing language used by Justice Scalia in Crawford v. Marion County Election Board, 553 U.S. ___ 128 S.Ct. 1610 (2008). That case dealt with Indiana's voter ID law, and the Supreme Court upheld that law but did so without a majority opinion. Justice Scalia's language, relied upon by the plaintiffs in this case, was in a concurring opinion, joined only by Justices Thomas and Alito. This court concludes that Justice Scalia's concurring language does not provide a sufficient basis for the court to ignore the holdings of both *Jenness* and *Crawford*.

For the foregoing reasons the defendant's motion to dismiss [Doc. No. 3] is GRANTED; the plaintiffs' motion for summary judgment [Doc. No. 14] is DISMISSED as moot.

SO ORDERED, this 26th day of May, 2009.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-13277-II

FAYE COFFIELD,
JASON CROWDER,
BEATRICE WILLIAMS,

Plaintiffs-Appellants,

versus

BRIAN KEMP,
in his official capacity as Georgia
Secretary of State and Chairperson of
the Georgia State Election Board,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Aug. 4, 2010)

Before: EDMONDSON and MARCUS, Circuit Judges, and BARBOUR,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

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* Honorable William Henry Barbour, Jr., United States District Court for the Southern District of Mississippi, sitting by designation.

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177 (2)

No. 10-596

In the Supreme Court of the United States

FAYE COFFIELD, et al.,

Petitioners,

v.

BRIAN KEMP, in his Official Capacity as Georgia Secretary of State and Chairperson of the Georgia State Election Board,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE DEMOCRACY, COALITION FOR FREE AND OPEN ELECTIONS, and FREE & EQUAL ELECTIONS FOUNDATION IN SUPPORT OF PETITIONERS

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December 6, 2010

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Democracy ("CCD") is a non-partisan, non-profit 501(c)(3) organization founded in 2005 to strengthen American democracy by increasing electoral competition. CCD works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering active civic engagement in the political process. This case is of interest to CCD because it involves a challenge to the constitutionality of Georgia's law governing ballot access for non-major party candidates for the United States House of Representatives, which is the most restrictive in the nation.

Coalition for Free and Open Elections ("COFOE") is a non-partisan organization that works to improve the legal environment for voters and candidates who prefer to express their political views outside the Democratic and Republican Parties. Founded in 1985, COFOE currently includes the Constitution, Green, Libertarian, Socialist, and Working Families Parties. COFOE has an interest in this case because its members have been unable to place their candidates for the United States House of Representatives on Georgia's ballot in regularly-scheduled elections ever

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[1] This brief is filed with the written consent of all parties. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

since Georgia increased its ballot access requirements for that office in 1964.

The Free and Equal Elections Foundation ("Free & Equal") is a non-partisan educational organization whose mission is to provide people with the tools and information they need to make educated political decisions and participate in all areas of governance. Free & Equal believes the democratic process can function properly only when all candidates have reasonable access to the ballot. Free & Equal has an interest in this case because its sister organization, Free & Equal Inc., headed a petition drive for a candidate who was denied access to Georgia's 2010 general election ballot.

STATEMENT

Georgia's ballot access requirements for minor party and independent congressional candidates are more restrictive than those of any other state in the nation.[2] Since Georgia amended its laws to increase

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[2] Before 1943, Georgia permitted any minor party or independent candidate to appear on the general election ballot with no petition whatsoever. In 1943, Georgia amended its law to require that independent candidates and parties that had not polled 5 percent for a particular office in the last election submit a petition signed by 5 percent of registered voters. Georgia amended its law again in 1964, to require such petitions from parties that had not polled 20 percent of the vote in the last gubernatorial election, or of the nationwide vote in the last presidential election. The 1964 amendments also required that each petition sheet be notarized, and that the petitioning candidate pay a filing fee. Finally, Georgia moved its deadline for submitting petitions from October to September. These requirements remain in effect. O.C.G.A. § 21-2-170 (2010).

those requirements in 1964, not one minor party or independent candidate for United States House of Representatives has appeared on Georgia's ballot in any regularly-scheduled election.[3] This major party monopoly over Georgia's congressional election ballot is unique in the United States. In every other state, minor party or independent congressional candidates have appeared on the ballot at least once since 1965, including at least once in the last decade.

This case involves a challenge to one aspect of the 1964 amendments to Georgia's law, brought by Faye Coffield, an independent candidate for the U.S. House, who unsuccessfully attempted to access Georgia's 2008 general election ballot ("Petitioner"). Specifically, Petitioner challenges Georgia's requirement that minor party and independent congressional candidates submit nomination petitions with signatures equal in number to 5 percent of all registered voters eligible to vote for that office in the last election. O.C.G.A. § 21-2-170 (2010). The District Court and the Eleventh Circuit Court of Appeals summarily rejected Petitioner's challenge, on the ground that this Court upheld Georgia's 5 percent requirement nearly 40 years ago. *See Jenness v. Fortson*, 403 U.S. 431 (1971). In *Jenness*, however, the Court's decision was premised on its conclusion that the 5 percent requirement does not "operate to freeze the political status quo" in Georgia. *Id.* at 438-39. That conclusion is inconsistent with the facts of this case, because no congressional candidate has complied with the 5

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[3] Georgia does not require candidates to submit nomination petitions in special elections

percent requirement in the entire time since *Jenness* was decided.

In dismissing Petitioner's challenge, the 11th Circuit suggested that perhaps no minor party or independent congressional candidates had complied with Georgia's 5 percent requirement since 1964, because none had tried. *See Coffield v. Kemp*, 599 F.3d 1276, 1277 (11th Cir. 2010). The primary purpose of this brief is to provide the Court with facts that refute such conjecture. While *Amici* agree with Petitioner that the number of candidates who unsuccessfully petitioned to access Georgia's ballot cannot be known, because no public record of such efforts exists, *Amici* nevertheless can confirm that no fewer than 10 candidates tried but failed in the 2010 election alone. *See infra* Part I.

Amici also submit this brief to alert the Court to a factual error in *Jenness*, which suggests that Georgia's 5 percent requirement does in fact operate to freeze the political status quo. Specifically, the Court's decision in *Jenness* was based on its conclusion that Georgia's 5 percent requirement was not as burdensome as Ohio's 15 percent requirement, which the Court had recently struck down. *See Williams v. Rhodes*, 393 U.S. 23 (1968). Georgia's law requires 5 percent of all *registered* voters, however, whereas Ohio's required 15 percent of *actual* voters in the last gubernatorial election. Because the pool of all registered voters is inevitably larger than the pool of actual voters in any election, Georgia's requirement is, in fact, more burdensome than the requirement struck down in *Williams*.

Whether or not Georgia's political status quo was frozen in 1971, when *Jenness* was decided, the failure of any minor party or independent candidate for U.S. House to comply with Georgia's 5 percent requirement since then suggests that, in the context of congressional elections, Georgia's political status quo is in fact frozen in 2010. Therefore, it was improper for the 11th Circuit to rely on *Jenness* to dispose of this case.

SUMMARY OF ARGUMENT

This Court has made clear that no "litmus-paper test" exists for determining the constitutionality of ballot access laws. *Storer v. Brown*, 415 U.S. 724, 742 (1974). Instead, a reviewing court must consider whether or not candidates are actually able to comply with the law as it is applied in practice. *See id.* If "reasonably diligent" candidates are "only rarely" able to comply with a law, then the law is constitutionally suspect. *See id.*

In this case, the 11th Circuit erred by summarily rejecting Petitioner's challenge to Georgia's 5 percent signature requirement on the ground that this Court upheld the requirement nearly 40 years ago in *Jenness*. The 11th Circuit did not address the fact that no minor party or independent congressional candidate has complied with Georgia's 5 percent requirement in 46 years, except to suggest that perhaps such candidates have not tried. By disregarding facts indicating that Georgia's 5 percent signature requirement is unconstitutionally burdensome as applied to congressional candidates, therefore, the 11th Circuit improperly applied *Jenness* as a "litmus-paper test" to dispose of this case.

The fact that numerous candidates have tried but failed to comply with Georgia's 5 percent requirement demonstrates the 11th Circuit's error in relying on *Jenness* in this case. Contrary to the Court's conclusion in *Jenness*, which was decided in 1971, Georgia's political status quo with respect to congressional elections appears to be frozen in 2010. Furthermore, in *Jenness*, the Court mischaracterized and underestimated the burden that Georgia's 5 percent requirement imposes, which suggests that the political status quo with respect to congressional elections may have been frozen at the time when *Jenness* was decided. The failure of any minor party or independent candidate for U.S. House to comply with Georgia's 5 percent requirement since then supports that conclusion.

ARGUMENT

I. NUMEROUS CANDIDATES FOR U.S. HOUSE HAVE TRIED BUT FAILED TO COMPLY WITH GEORGIA'S 5 PERCENT REQUIREMENT SINCE 1964, AND NOT ONE HAS SUCCEEDED, DEMONSTRATING THE LOWER COURTS' ERROR IN RELYING ON *JENNESS* TO DISPOSE OF THIS CASE.

The 11th Circuit faulted Petitioners for failing to allege how many minor party and independent candidates for U.S. House have attempted to comply with Georgia's 5 percent requirement. *See Coffield*, 599 F.3d at 1277. The conspicuous absence of these candidates from Georgia's ballot since 1964 might simply reflect a lack of effort, the 11th Circuit reasoned. *See id. Amici* can dispel that myth. While it

is impossible to know the total number of candidates who launched unsuccessful petition drives in Georgia in the last 46 years, no fewer than 10 did in the 2010 election cycle alone – and their failure certainly was not for lack of effort.

A. No Fewer Than Nine Independent and One Minor Party Candidates Tried But Failed to Access Georgia's Ballot in the 2010 Election.

The state of Georgia, like every other state, does not maintain any record of candidates who were denied access to its ballot. Nevertheless, based on their own advocacy on behalf of minor party and independent candidates and voters, *Amici* can confirm that the following candidates tried but failed to access Georgia's 2010 general election ballot.

Jeff Anderson, an independent candidate for U.S. House in Georgia's 11th district, planned his petition drive more than two years in advance, and collected more than 14,000 signatures in an effort to meet the 20,819 signature total mandated by the state's 5 percent requirement. *See* Richard Winger, *Georgia Independent Congressional Candidate, Denied Ballot Access, Will Pursue Strong Write-in Campaign*, BALLOT ACCESS NEWS (August 12, 2010). That would have been enough signatures to qualify for the ballot in any other U.S. House district in the nation, except those in North Carolina and possibly certain heavily populated districts in Illinois and California. *See id.* In Georgia, however, Anderson was denied access to the ballot.

Brad Bryant, the incumbent state schools Superintendent, had the weight of Governor Sonny

Perdue's support behind him, but he still could not qualify for a spot on Georgia's 2010 ballot. *See* Dorie Turner, *Bryant Won't Run for Schools Superintendent*, ASSOCIATED PRESS (July 13, 2010). The governor appointed Bryant to an interim term shortly after the deadline for partisan primary elections, forcing him to seek re-election as an independent. *See id.* Bryant collected more than 36,000 signatures in a few weeks, but fell well short of the 44,071 signatures mandated by Georgia's lesser 1 percent requirement for statewide candidates.[4] *See id.*; O.C.G.A. § 21-2-170 (2010).

Millionaire Ray Boyd spent more than $2 million on his 2010 Republican primary campaign for governor, but the party denied him ballot listing because he declined to swear a loyalty oath. *See* Associated Press, *Boyd Quits Georgia Governor's Race*, THE AUGUSTA CHRONICLE (June 27, 2010). Boyd vowed to run as an independent, and hired a private firm to launch his petition drive. *See id.* He still failed to collect the 51,320 signatures mandated by Georgia's lesser 1 percent requirement for statewide candidates. *See id.*

Keith Tomkins, an independent candidate for the Georgia State House in 2010, submitted approximately 1,950 signatures to meet the 1,806 total mandated by Georgia's 5 percent requirement, but fell short by 66 signatures. *See* Sarah Fay Campbell, *Tompkins Fails*

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[4] Although *Amici* do not argue that Georgia's 1 percent requirement for statewide candidates is necessarily unconstitutional, the failure of candidates to meet this lesser requirement demonstrates that it, too, may be unduly burdensome.

to Qualify for Ballot, THE NEWNAN TIMES-HERALD (August 3, 2010). Tomkins was not informed of the grounds on which his petition signatures were invalidated, but believes it was because some signatures were submitted on letter-sized paper, while others were on legal-sized paper. *See id.*

Brad Ploeger, the lone minor party nominee to submit a nomination petition in 2010, sought to run as a Libertarian Party candidate for the Georgia State House. *See* Richard Winger, *Most Georgia Independent Candidate Petitions Fail to Have Enough Valid Signatures*, BALLOT ACCESS NEWS (August 3, 2010). Ploeger submitted more than enough signatures to meet the total mandated by Georgia's 5 percent requirement, but approximately half of his petition signers were not registered in his district. The invalidation of those signatures caused Ploeger's petition to fall short. *See id.*

Four more independent state legislative candidates attempted to access Georgia's ballot in 2010: Chuck Pardue for State Senate, 23rd district; Brook Nevel for State House, 51st district; Allen Williamson for State House, 82nd district; and Kirk Howell for State House, 108th district. *See id.* Each of these candidates failed to collect the necessary signatures under Georgia's 5 percent requirement, and were denied placement on the ballot. *See id.*

Finally, Mary Norwood, an Atlanta city councilwoman who fell only 718 votes shy of winning the mayoral election in 2009, was nonetheless denied access to Georgia's 2010 ballot as an independent candidate for Chair of the Fulton County Board of Commissioners. *See* Associated Press, *Atlanta Would-*

Be Mayor Won't Get Fulton County Spot, WASHINGTON EXAMINER (July 13, 2010). Norwood submitted approximately 33,000 signatures to meet the 22,598 signature total mandated by Georgia's 5 percent requirement, but elections officials did not check her petitions' validity, because she paid the filing fee before close of business on the day it was due, and Georgia sets the deadline at noon. *See* Richard Winger, *Most Georgia Independent Candidate Petitions Fail to Have Enough Valid Signatures*, BALLOT ACCESS NEWS (August 3, 2010).

Many more minor party and independent candidates have attempted to access Georgia's ballot without success in prior elections. For example, five candidates of the Georgia Libertarian Party tried but failed in the 2004 general election. *See* Maggie Large, *Libertarians Meet at Macon Eatery*, THE MACON TELEGRAPH (August 29, 2005). Wayne Parker, the Libertarians' nominee for U.S. House, 11th District, likewise tried but failed to access Georgia's 2002 general election ballot. *See* Brian Long, *3rd Parties Need Not Apply: Georgia Sets High Bar on Ballot Access*, THE ATLANTA JOURNAL-COUNSTITUTION (September 30, 2002). Mr. Parker sought injunctive relief in federal court, but the federal court abstained. *See Parker v. Barnes*, No. 1:02-CV-1883-BBM (N.D. Ga. October, 8, 2002).

B. The Failure of Any U.S. House Candidate to Comply With Georgia's 5 Percent Requirement Since 1964 Demonstrates the Lower Courts' Error in Relying on *Jenness* to Dispose of This Case.

It is a matter of settled law that reviewing courts must consider "past experience" to determine the constitutionality of ballot access laws. *Storer*, 415 U.S. at 742. If "reasonably diligent" candidates "only rarely" succeed in getting on the ballot, such laws are suspect. *Id.* Indeed, this Court has repeatedly recognized that ballot access laws which block all competition to the two major parties are unconstitutional. *See, e.g., Williams*, 393 U.S. at 32 (striking down Ohio's law because it "tends to give [the major parties] a complete monopoly"); *see also Jenness*, 403 U.S at 439; *American Party of Texas v. White*, 415 U.S. 767, 783 (1974); *Munro v. Socialist Workers Party*, 479 U.S. 189, 197 n.11 (1986); *Burdick v. Takushi*, 504 U.S. 428, 436 (1992). Georgia's 5 percent requirement plainly fails this test.

Case law relied upon by the lower courts in this very case confirms that minor party and independent candidates have been "clamoring for a place on the ballot" in Georgia for years. *Williams*, 393 U.S. at 31; *see Coffield*, 599 F.3d at 1277 (citing *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002)). In *Cartwright*, the 11th Circuit upheld Georgia's 5 percent requirement on the ground that *Jenness* "directly addressed" that requirement. *Cartwright*, 304 F.3d at 1141. For the 11th Circuit, the fact that no minor party candidate for U.S. House had ever complied with

Georgia's 5 percent requirement was immaterial. *See id.*

Nearly a decade has passed since *Cartwright* was decided, and still no minor party or independent candidate for U.S. House has overcome the 5 percent requirement to appear on Georgia's ballot. Nevertheless, in this case, the District Court concluded that Petitioner's challenge to Georgia's 5 percent requirement is "foreclosed" by *Jenness*, and the 11th Circuit concurred, observing that "the pertinent laws of Georgia have not changed materially" since *Jenness* and *Cartwright* were decided. *Coffield*, 599 F.3d at 1277. This was clear error.

The lower courts erred because they improperly applied *Jenness* as if it were a "litmus-paper test," without addressing the fact that no minor party or independent congressional candidate has been able to comply with Georgia's 5 percent requirement in the nearly 40 years since that case was decided. *See Storer*, 415 U.S. at 730. Had the 11th Circuit properly addressed such past experience, as *Storer* requires, *see id.* at 742, it could not have relied upon *Jenness* to summarily dispose of Petitioner's challenge. *Jenness* relied on the conclusion that Georgia's ballot access scheme does not operate to freeze the political status quo. *See Jenness*, 403 U.S at 438. That conclusion is inconsistent with the facts of this case. Therefore, *Jenness* should not be used to dispose of this case without proper consideration of the factual record.

II. TO THE EXTENT THAT *JENNESS* APPLIES TO THIS CASE, IT SHOULD BE RECONSIDERED, BECAUSE THAT DECISION RESTS ON A FACTUAL PREMISE THAT IS DEMONSTRABLY FALSE.

Jenness also should not be relied upon to dispose of Petitioner's challenge, because *Jenness* mischaracterized and underestimated the burden imposed by Georgia's 5 percent requirement. The Court decided *Jenness* just three years after striking down Ohio's entire ballot access scheme on the ground that it effectively granted the major parties a monopoly over the electoral system. *See Williams*, 393 U.S. at 32. In *Jenness*, therefore, the Court was concerned to demonstrate that Georgia's law was not as burdensome as Ohio's. *See Jenness*, 403 U.S at 438. In fact, Georgia's signature requirement is more burdensome than Ohio's was in *Williams*.

In *Williams*, Ohio required that minor parties submit a petition with signatures equal in number to 15 percent of *actual* voters in the last gubernatorial election. *See Williams*, 393 U.S. at 25. Georgia, by contrast, requires signatures equal in number to 5 percent of all *registered* voters. *See Jenness*, 403 U.S at 432. Because the pool of actual voters in any election is inevitably smaller than the pool of all registered voters, Georgia's law actually required many more signatures than Ohio's law required. *See* Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION LAW JOURNAL No. 2, 242 (2002) (attached as Appendix A).

Had Georgia applied Ohio's 15 percent requirement instead of its own 5 percent requirement, the candidate in *Jenness* would have been required to submit 68,252 signatures. *See id.* at 243. Instead, under Georgia's 5 percent requirement, the candidate needed 88,175 signatures. *See id.* Yet while the Court struck down Ohio's less burdensome signature requirement in *Williams*, it upheld Georgia's more burdensome signature requirement in *Jenness*, on the ground that Georgia's statutory scheme, unlike Ohio's, did not "operate to freeze the political status quo." *Jenness*, 403 U.S at 438.

The Court based its conclusion in *Jenness* on the fact that two candidates had recently complied with Georgia's 5 percent requirement.[5] *See id.* at 439. One candidate, however, was a Republican – 1966 gubernatorial nominee Howard Callaway – who had all the resources of a major party at his disposal. *See id.* at 439 & n.21. The other was 1968 American Independent Party presidential nominee George Wallace, the former Democratic governor of Alabama, a segregationist who enjoyed unprecedented support for a minor party candidate in the South. *See id.* at 439 & n.22. Even if these examples were sufficient to support the Court's conclusion in *Jenness*, however, they are plainly insufficient now, because not one minor party or independent candidate for U.S. House has complied with Georgia's 5 percent requirement

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[5] The Court also found that Georgia did not impose "suffocating restrictions" on the circulation of nomination petitions. *Jenness*, 403 U.S at 438. In fact, however, Georgia imposes several such restrictions, which the Court failed to address in *Jenness*. *See generally*, Winger, *The Supreme Court and the Burial of Ballot Access*, 1 ELECTION LAW JOURNAL 2 at 238-39.

since before that case was decided - a period of 46 years.

Despite the fundamental flaw in *Jenness*, the lower courts have cited that decision repeatedly to uphold burdensome ballot access laws across the nation. *See* Winger, *The Supreme Court and the Burial of Ballot Access*, 1 ELECTION LAW JOURNAL 2 at 249-52 (citing 126 such cases in state and federal courts). Meanwhile, at least two Federal Courts of Appeals have expressed confusion as to the proper standards and methods for reviewing such cases. *See, e.g., Manifold v. Blunt*, 863 F.2d 1368, 1373 n.9 (8th Cir. 1988) (recognizing "the apparent inconsistency in the standard of review applied by the Supreme Court" in ballot access cases); *Socialist Workers Party v. Eu*, 591 F.2d 1252, 1261 n.5 (9th Cir. 1978) ("The methodology of the Supreme Court...is not easily discerned" in ballot access cases). *Amici* respectfully suggest that such confusion flows from the factual error in *Jenness*, which led the Court to uphold a requirement that no congressional candidate has met in 46 years. This case presents the Court with the opportunity to correct that error, which is becoming more apparent with each passing year. *Jenness* should be reconsidered.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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The Supreme Court and the Burial of Ballot Access: A Critical Review of *Jenness v. Fortson*

RICHARD WINGER

THE UNITED STATES SUPREME COURT has issued 12 opinions concerning the constitutionality of state election laws that control ballot access for minor parties and independent candidates. One of the most influential of these decisions has been *Jenness v Fortson*.[1] *Jenness* upheld Georgia's ballot access laws. In the 30 years since it was issued, the U.S. Supreme Court has quoted *Jenness* approvingly in nine subsequent ballot access opinions. Minor parties and independent candidates have lost many constitutional lawsuits in lower courts in the last 30 years; when they do lose, almost invariably, *Jenness* is cited. There are at least 126 constitutional cases which minor parties and independent candidates have lost in lower courts, which cited *Jenness*.[2] State legislatures have

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[1] 403 US 431 (1971).

[2] These cases include one from Alabama, two from Arizona, four from Arkansas, ten from California, three from Colorado, two from Connecticut, one from Delaware, eleven from Florida, eleven from Georgia, three from Hawaii, one from Idaho, five from Illinois, three from Indiana, one from Kansas, one from Kentucky, one from Louisiana, two from Maine, three from Maryland, four from Massachusetts, four from Michigan, two from Missouri, one from Montana, one from New Hampshire, two from New Jersey, three

toughened ballot access laws in almost half the states since *Jenness* appeared, confident that the new restrictions would not be overturned in court. *Jenness* is the reason that lawsuits filed by minor parties and independent candidates, against laws that keep them off ballots, do not usually succeed.

Minor party and independent candidates in the United States do have a problem with overly severe ballot access laws. In November 2000, no presidential candidate except the Republican and Democratic nominees appeared on the ballots of all states. The candidate who placed third, Ralph Nader, failed to appear on the ballot in seven states. Voters who wished to vote for Nader were forced to cast a writein vote in Georgia, Idaho, Indiana and Wyoming; and in North Carolina, Oklahoma, and South Dakota, those voters were even barred from casting a write-in vote for him. Nader voters in those states were not treated equally, relative to voters who wished to vote for George W. Bush and Al Gore. And even when minor party or independent presidential candidates do manage to qualify for the ballot in all states, they are always required to spend hundreds of thousands, or millions, of dollars, doing so. This situation, which is harmful to many voters, exists because of *Jenness v Fortson*.

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from New Mexico, eight from New York, two from North Carolina, two from North Dakota, four from Ohio, three from Oklahoma, two from Oregon, six from Pennsylvania, one from Tennessee, three from Texas, two from Utah, four from Virginia, two from Washington, three from West Virginia, and two from Wyoming. See the list in the Appendix to this article.

Paradoxically, despite the impact *Jenness v Fortson* has had on policy, it is an unusually flawed opinion. Some of its "facts" are incorrect. Many other facts, germane to the decision, which were mentioned in the briefs or in the oral argument, are absent from the opinion. All six of the conclusions that the Court drew about Georgia's ballot access laws, and about ballot access laws in general, were either based on factual error, or ignored important factual evidence.

Jenness has been criticized elsewhere.[3] Bradley A. Smith, in particular, has pointed out flaws in the Court's Equal Protection analysis. This article will not duplicate that analysis, but will show that the decision contained numerous other deficiencies, including ignoring many essential facts and committing factual errors. This article will also show the policy impact that *Jenness* has had.

BALLOT ACCESS BACKGROUND

In order to understand the *Jenness* case, some background information is useful. There were no government-printed ballots in the United States before 1888. Prior to that time, voters were free to make their own ballots. However, most voters chose to use a ballot printed by that voter's favorite political party. Party-printed ballots only listed the nominees of that one particular party. A voter was free to use a partyprinted ballot, but to scratch out the names of anyone he didn't wish to vote for, and write in the name of an opposing

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[3] See Bradley A. Smith, Note, "Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply," 28 *Harvard Journal on Legislation* 167 (1991).

candidate. Therefore, before 1888, the government had no means to prevent anyone from running for office, nor did the government have any means to prevent any political party from running candidates. Nevertheless, political scientists agree that the United States had a two-party system for almost all of its history prior to 1888. The lesson this history teaches us, is that a two-party system exists naturally (unless proportional representation election systems are used), even when the government does not practice legal discrimination for or against any class of political parties. The United States enjoyed a stable government for most of its history before 1888. This history shows that governmental stability in a country like the United States is not dependent on any particular set of ballot access laws, much less on restrictive or discriminatory ballot access laws. British history bolsters this conclusion. British election law has never required more than 10 signatures for anyone to get on the ballot for member of Commons, yet Britain has had stable and orderly elections for more than 150 years.[4]

When state governments began printing ballots, they needed a law to tell them which parties' candidates should be placed on the ballot. Many states provided that any group could place candidates on the ballot, simply by request. No numerical requirements existed. Other states required groups that hadn't polled some specified percentage of the vote in the

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[4] 236 4 In 1918, Britain imposed a filing fee on candidates for House of Commons, of 150 pounds. This requirement applied to all candidates; it was not discriminatory on its face. It was refunded if the candidate polled at least 15%. In 1984 the fee was increased to 500 pounds, refunded if the candidate polled 5%.

most recent election, to submit a petition. The commonest petition requirement for the original ballot access laws was 500 signatures. The second commonest requirement was 1,000 signatures. These petitions usually had to be submitted 30 days before a general election.[5]

As recently as 1948, over half the states still had laws like the ones described above. Twelve states had no numerical requirements for a new or previously unqualified party to place its presidential candidate on the ballot; and another 13 states had a numerical requirement (usually a petition requirement) that was 1,000 or a smaller number. A small number of states had harsher requirements, but as recently as 1936, no state had ever required more than 25,000 signatures, for new or minor party ballot access.[6]

During the period 1937-1967, however, a few states began requiring massive petition requirements, for new or minor party access to the ballot. By 1968, there were seven such states, with the year of the change noted in parentheses: California (1937), Georgia (1943), Maryland (1967), Massachusetts (1939), Ohio (1951), Oregon (1953), and Tennessee (1961). Also, as of 1968, Florida required fewer than 25,000 signatures for minor party presidential candidates, but had a

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[5] See the author's article "History of U.S. Ballot Access Law for New and Minor Parties," *The Encyclopedia of Third Parties in America* 72 (2000, M.E. Sharpe, Armonk, N.Y.)

[6] Based on the author's research of past election laws, and election data from official state sources. Many ballot access requirements are based on percentages of the last vote cast, or the number of registered voters.

substantially more difficult requirement for minor party candidates for office other than president.

The effect of these news laws was to exhaust minor parties that couldn't poll enough votes to win exemption from the mandatory petitions. Petitioning may be fun the first time an individual or a group engages in it. But when one is expected to go out on the streets and beg strangers for their signature every two years, one soon gets very tired of this activity. The nation's permanent minor parties (which, in the 1930s and 1940s, were the Socialist, Prohibition, Communist, and Socialist Labor Parties) began appearing on the ballots of fewer and fewer states, as more states imposed high petition requirements.

During the mid-1960s, the U.S. Supreme Court began taking an activist role in election law. It declared poll taxes to be unconstitutional. It struck down property ownership requirements for voters. It required congressional and legislative districts to be of approximately equal population. It upheld the Voting Rights Act of 1965, and construed it to apply to candidate restrictions as well as to restrictions on voters. And, in 1968, it ruled that state ballot access laws that make it virtually impossible for new parties, or independent candidates, to get on the ballot, violate the 1st and 14th amendments. The Court struck down Ohio's ballot access laws in 1968 in a case called *Williams v Rhodes*.[7] It struck down some Alabama ballot access regulations (as applied) in 1969, in

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[7] 393 U.S. 23 (1968).

Hadnott v Amos.[8] Also in 1969, it struck down a distribution requirement in Illinois' statewide petition (statewide petitions needed not only 25,000 signatures, but 200 from each of 50 counties; the distribution requirement was invalidated on the basis that counties are not of equal population). In 1970, it summarily affirmed a lower court ruling, striking down New York's similar distribution requirement.

But in 1971, the Court put a halt to virtually all successful litigation against onerous ballot access laws, in *Jenness v Fortson*.

BACKGROUND TO *JENNESS V. FORTSON*

Jenness had been filed in 1970 by the Socialist Workers Party, and its candidates for Governor and for two U.S. House of Representatives seats. The party complained that its nominees were required to obtain the signatures of 5% of all the registered voters, on separate petitions. Linda Jenness, candidate for Governor, needed 88,175 valid signatures. Joseph F. Cole, candidate for Congress, 4th district, needed 10,904 valid signatures on a different petition. Francis Grinnon, candidate for Congress, 5th district, needed 11,008 valid signatures on yet another petition. The Socialist Workers Party described itself as a small party with ideas not yet accepted by most voters. As a result, the party said that it could not get that many signatures on petitions. Therefore, it could not place its nominees on the ballot, and its electoral campaigns were stifled. The party argued that the Georgia ballot

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[8] 394 U.S. 358 (1969).

access laws violated the First Amendment. The party also argued that the ballot access laws denied them Equal Protection, relative to the Democratic and Republican Parties and their nominees. The Socialist Workers pointed out that a party which had polled 20% of the vote for president in the entire nation, or 20% of the vote for Governor of Georgia, was able to place its nominees on the ballot with no petition, if those parties held a primary election. At the time, in Georgia, parties administered their own primaries. Individuals seeking the nomination of the Republican or Democratic Parties didn't need any petitions, either. They could get on their own party's primary ballot if they paid a filing fee.

Georgia's 20% vote definition of "political party" was so stringent, no group other than the Democratic or Republican Parties could have met it, since 1912, when the "Bull Moose" Progressive Party had polled over 20% of the vote for president in the nation as a whole. No third party had polled as much as 20% of the vote for Georgia Governor since the Peoples Party had last done it in 1898.[9] The consequences of the law were that Democrats and Republicans never needed any petition, but everyone else who wanted to run for partisan office in Georgia needed a hefty petition.[10] The petition had only been required since 1943. Prior to 1943, any group or independent candidate could gain a place on the general election ballot, simply on

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[9] See *Guide to U.S. Elections,* p. 284–299 and p. 404 (Congressional Quarterly, Washington, D.C., 1975).

[10] Except that Georgia did provide that an independent candidate who was elected, need not repetition when his or her term was up, in order to run for re-election.

request. Yet Georgia had never had more than six candidates on the ballot for any statewide race, in the entire history of government-printed ballots (Georgia had only had government-printed ballots since 1922).[11]

FACTUAL ERRORS AND OMISSIONS IN *JENNESS V. FORTSON*

The U.S. Supreme Court upheld every aspect of the Georgia ballot access laws. The opinion was unanimous. It asserted six points, all of which are inaccurate, as this article will attempt to show. The opinion said:

1. The Georgia ballot access laws are not onerous, and therefore they do not violate the First Amendment.
2. The Georgia ballot access laws are less onerous than Ohio's ballot access laws, which had been found to violate the First Amendment.
3. The Georgia ballot access laws do not violate the Equal Protection Clause of the 14th amendment.
4. Tolerant ballot access laws cause confusion.
5. Tolerant ballot access laws cause deception.
6. Tolerant ballot access laws cause frustration of the democratic process.

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[11] *Ballot Access News*, Sep. 1, 2001, p. 4. See www.ballotaccess.org.

1. Were the Georgia ballot access laws onerous?

Georgia ballot access laws said that unless a group had polled 20% of the vote for President in the entire nation, or 20% for Governor of Georgia, at the last election, it needed a separate petition for each one of its nominees, to be placed on the November ballot. Each petition needed the signatures of 5% of the registered voters in the area for which the nominee was running. The petition had to carry the name of the nominee, yet the petition could only carry the name of a single nominee. No substitution of nominees was permitted. If the nominee named on the petition died, or withdrew, after the petition was turned in, the group couldn't substitute another nominee. Petitions had to be notarized. They could not be circulated by anyone who was not registered to vote in the area for which the nominee was running. They were due in mid-June of an election year, and could not be circulated until mid-January of the election year. Petitions could only be signed by registered voters.

The deadline. If the Georgia mid-June deadline had been in effect in 1912, it would have prevented Theodore Roosevelt, "Bull Moose" Progressive Party nominee, from qualifying. He was not nominated until August 5, 1912. It would have kept U.S. Senator Robert La Follette, Progressive independent presidential candidate in 1924, off the ballot; he didn't declare until July 5. The Georgia law would have prevented Strom Thurmond, States Rights Party nominee, from qualifying; he didn't organize his party, or receive its presidential nomination, until July 17, 1948. The deadline would even have kept the Republican Party from running candidates in the year it was organized, since it was formed on July 6, 1854.

Yet the Court seemed to approve of the deadline. It said, "Georgia does not fix an unreasonably early filing deadline (p. 438)." This sentence is still being used to justify other June petition deadlines.[12]

The restriction on who can petition. The Georgia requirement that a petitioner must be a registered voter, able to vote for the nominee whose petition he or she was circulating, was unusually restrictive.[13] It was located in Section 34-1010(d)(i) of the election law. It said, "Each sheet shall bear on the bottom or back thereof the affidavit of the circulator of such sheet, setting forth that the affiant is a duly qualified and registered elector of the State entitled to vote in the next general election for the filling of the office sought by the candidate supported by the petition."[14] It prevented the Socialist Workers Party from accepting petitioning assistance from out-of-state members of the party. It even prevented a member of the Georgia party who happened to live in the 5th district, from helping to circulate the petition of the party's congressional candidate in the 4th district. The *Jenness* court knew about this restriction. Page 13 of

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[12] See *Nader 2000 Primary Committee v Bartlett*, order of Aug. 9, 2000 (U.S. District Court, E.D.N.C. 5:00-cv-348- BR3), upholding a May petition deadline which was one of the factors keeping Ralph Nader off the North Carolina ballot.

[13] Chief Justice Rehnquist's dissent in *Buckley v American Constitutional Law Foundation*, 525 U.S. 182 (1999), footnote 3, asserts that only 19 states even required petitioners for candidates to be registered voters, must less registered voters within any particular district.

[14] This restriction was repealed by the Georgia legislature in 1974. See 1974 Session Laws, Ch. 757, p. 6.

the official transcript of the oral argument before the Supreme Court shows that the attorney for the party discussed it, and answered a question about it. Discussion of the restriction fills 22 lines of the transcript.

What did the Court say about this petitioning restriction? It said only, "Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions" (p. 438). The Court not only didn't mention the restriction; it implied that there was no such restriction.

The requirement for separate petitions for each nominee. Georgia, as of 1970, elected 19 partisan statewide state executive and judicial officers.[15] Of course, it also elected state legislators, members of Congress, and county partisan executive and legislative posts. A new party, or a party that hadn't polled 20% of the vote at the last presidential or gubernatorial election, would have needed a separate petition for each one of its nominees. If the new party wished to run a full slate of candidates, it would have needed between 25 and 30 separate petitions, everywhere in the state. Nothing could be more suffocating than a law requiring any party to ask a person on the street to print his or her name, print his or her address, and then sign 25–30 different pieces of paper.

What did the Court say about this problem? Nothing, except for its breezy comment, already quoted

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[15] Georgia Secretary of State, *Official Tabulation of Votes, Election of November 1970.*

above, that Georgia imposes "no suffocating restrictions" on petitioning. Yet the law was in the Court's record, and is clear. Section 34-1001(c) said, "Each of such candidates shall accompany his notice of candidacy with a nomination petition."

The notarization requirement. Georgia, starting in 1964, required petitions to be notarized.[16] This was a requirement that most states did not have; 19 states require ballot access petitions to be notarized. The Georgia notarization requirement was contained in section 34- 1010(d) at the time *Jenness* was heard, and today is found in 21-2-183(b). It has never been amended. It is a severe requirement. In 1996, two minor party statewide petitions in Georgia (Natural Law and Constitution) were disqualified, because in each case a notary public who had notarized a substantial proportion of their petitions, had himself or herself acted as a petitioner. Under the Georgia Supreme Court decision *Poppell v Lanier*,[17] all of the signatures notarized by that notary were automatically invalid.

What did the Court say about notarization? "No signature on a nominating petition need be notarized." There is a footnote to this sentence, but it says, "Contrast, Colo. Rev. Stat. Ann. Sec. 49-7-1-(4)(Supp. 1967)." Why did the Court say Georgia didn't require petitions to be notarized, when the truth is that Georgia did require notarization? There is no answer.

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[16] See 1964 Session Laws, extraordinary May–June session, Ch. 26, p. 30.

[17] 448 SE 2d 194 (Ga. 1994).

The briefs, and the oral argument, did not mention notarization.

The starting date. Most states have never had a law, providing a legal "start date" for a ballot access petition. In the absence of any such restriction, in most states a petition can circulate as early as its proponents wish. At the time of the *Jenness* hearing, ballot access petitions to place an independent candidate had no legal limit on when they could start, except in 14 states (California, Colorado, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, New York, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, and Wisconsin). Even fewer states mandated a start date for petitions to qualify a new party. It is a big advantage to parties, to be allowed to petition early. In an odd year, when the demand for paid petition circulators is much lower than it is in election years, a party can save money because paid petitioners charge substantially lower rates. But when a state outlaws petitioning in odd years, such savings cannot be realized.

What did the Court say about the start date? It acknowledged that it existed, on page 433, but made no comment about it. Neutral observers would probably agree that a restriction outlawing petitioning in odd years is a "suffocating restriction."

The number of signatures, compared to other states. The Georgia requirement, that petitions to qualify minor party candidates be signed by 5% of the number of registered voters, was the nation's toughest percentage at the time the *Jenness* briefs were filed. The Court had full knowledge of the petition requirements of each of the 50 states. The Appendix in

Jenness, jointly prepared by attorneys for both sides, included the petition requirements of all 50 states. They showed that Georgia was the only state with a 5% (of the number of registered voters) requirement. There were two states with a 5% of the last vote cast requirement, but of course, 5% of the last vote cast, is far easier than 5% of the number of registered voters. Although Ohio in 1969 had passed a law requiring a petition requirement of 7% of the last gubernatorial vote, that law had been declared unconstitutional by a three-judge U.S. District Court in July, 1970. The Arkansas legislature had passed a law in early 1971, requiring a petition signed by 7% of the last gubernatorial vote, for new parties. But that law hadn't existed when the Appendix was prepared. Also, in Arkansas, 7% of the last gubernatorial vote never amounted to more than 4.4% of the number of registered voters, during the entire six years that the law existed.

What did the Court say? "The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States." Now, even if the Court had acknowledged that Georgia had the highest petition percentage requirement, that fact wouldn't necessarily mean that Georgia's law was unconstitutional. After all, if every state independently writes its own rules, obviously one state will have a more difficult requirement than any other state (unless there is a tie). What is interesting about the Court's "apparently somewhat higher than . . . in many States" quote, is that the Court couldn't even write an honest, factual sentence on this point. To say that Georgia is "apparently," "somewhat higher than many States" when the truth (known to the court, through the Joint Appendix) is that Georgia was the highest of

all 50 states, shows an inclination to shade the truth, not to tell the truth.

The number of signatures, historically. At the time of the hearing, no group or candidate had ever overcome a petition requirement as large as 88,175 signatures (the number of signatures Linda Jenness needed), except for the Henry Wallace Progressive Party in California in 1948. Although George Wallace had claimed to have collected 451,000 signatures in Ohio in 1968, the signatures were 5 months too late, so they are not an instance of a requirement that had been met.[18]

In percentage terms, only three times had any group or candidate ever successfully complied with a signature requirement as great as 5% of the number of registered voters. Those three were the California 1948 instance, and two examples in Georgia. In 1966, Republican gubernatorial nominee Bo Callaway[19] had

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[18] *Ballot Access News,* Aug. 1, 2001, p. 5, lists the highest requirement (number of petition signatures) successfully met, for each presidential and congressional election year of the 20th century. The party or candidate who met this requirement is also listed, in each instance. See www. ballot-access.org.

[19] The Republican Party was a qualified party in Georgia in 1966. Therefore, it is necessary to explain why Calloway submitted a petition. A separate Georgia law, not discussed in this article, encouraged qualified parties to conduct primaries to nominate their candidates. If they did not conduct a primary, and if they had not polled 10% of the vote for that particular office at the last general election, then they had to petition. According to various articles in the *Atlanta Constitution* in the spring of 1966, the Republican Party preferred to petition, rather than hold a primary, because it desired to field no candidate for Lieutenant

complied with a petition requirement of 68,250 signatures; and in 1968, American Party presidential candidate George Wallace had met the Georgia requirement of 83,339.

What did the Court say? It eagerly seized on the fact that the Georgia 5% petition had been met in 1966 and in 1968, but it made no mention of the fact that these had been the only two instances in the state's history, that the petition had been met by a statewide candidate. Also the Court failed to say that the 1966 and 1968 petition deadline had been in September. The 1969 legislature had moved the petition deadline three months earlier, to June.[20] Another detail, not mentioned by the court, was that Callaway relied on 30 paid petitioners to get his signatures.[21] Most minor parties couldn't afford to hire 30 paid petitioners. Also, the Court didn't mention that in 1948, when Strom Thurmond desired to gain a place on the ballot as the presidential candidate of the States Rights Party, the Georgia legislature had voted in special session in October 1948 to suspend the petition requirement, for presidential candidates.[22] Thus, Thurmond, as well as the Progressive, Socialist, and Prohibition Party presidential candidates, got on the 1948 ballot with no signatures.

Governor. Yet if the party had held a primary, it would have been unable to block anyone from entering its primary for that office.

[20] State Session Laws of 1969, Ch. 224, p. 336.

[21] *Atlanta Constitution,* Mar. 19, 1966, p. 3.

[22] State Session Laws, 1948 special session, Ch. 1, p. 4.

Thus, although the Court relied on history to buttress its conclusion, it was a highly selective history. In fairness to the Court, though, most of these facts weren't in the record.

Ameliorating factors in Georgia. The Court, at least having acknowledged that Georgia's petition requirement was comparatively large, then stated that the high number of signatures was balanced by the fact that Georgia did not have any "suffocating restrictions" on petitioning. It laid stress on the fact that Georgia permitted a voter to sign more than one petition for the same office. It said this twice, once on page 438 and again on page 442. However, the historical record showed that this was a meaningless gift. There had never, in all the years since Georgia first required petitions, been an instance when more than a single candidate had made a serious attempt to petition in any particular race. If only one petition circulates for any given office, then it is of no help that a voter may sign more than one such petition.

The Court also mentioned a few restrictions in other states, which didn't exist in Georgia. However, invariably these examples of restrictions in other states were present in only one, two or three states. For instance, the Court mentioned that primary voters could sign Georgia petitions. But at the time, only three states, Rhode Island, Texas and West Virginia, prohibited primary voters from signing such petitions. A U.S. District Court in Illinois, on January 28, 1971, had construed Illinois law not to have such a

restriction.[23] The Rhode Island restriction was to be declared unconstitutional in 1972.[24]

The Court even cited a New York law forbidding a voter who wasn't registered at the previous election from signing a petition. However, that law was no longer in effect. The U.S. Supreme Court itself had invalidated it, less than a year earlier, in a summary affirmance.[25] See footnote 19 of *Jenness,* referring to a New York law that was no longer enforceable.

In summary, the Georgia laws were onerous. The Court was able to make them seem reasonable by omitting much material and by making outright misstatements of fact.

2. Were the Georgia ballot access laws less onerous than the Ohio laws?

The Supreme Court, in *Jenness*, had to show that the Georgia ballot access laws were less restrictive than the Ohio laws, since in 1968 the Court had ruled that the Ohio laws were unconstitutionally harsh. Here again, the *Jenness* decision is inaccurate and incomplete.

A comparison of the numerical requirements. Before 1968, Ohio had required a new party to submit a petition signed by 15% of the last gubernatorial vote.

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[23] *Jackson v Ogilvie,* 325 F Supp 864 (N.D.Ill., 1971).

[24] *Yale v Curvin,* 345 F Supp 447 (1972).

[25] *Socialist Workers Party v Rockefeller,* 314 F.Supp. 984 (S.D.N.Y. 1970), pages 991–992, summarily affirmed, 400 U.S. 806 (1970).

An independent candidate in Ohio needed a petition signed by 7% of the last gubernatorial vote, and independent presidential candidates were not permitted. By comparison, Georgia required both minor party and independent candidates to submit a petition signed by 5% of the registered voters. Superficially, then, the Ohio requirement was more difficult, at least for presidential candidates, who had no choice in Ohio except to use the 15% procedure.

But, surprisingly, throughout most of the history of Georgia's 5% requirement, 5% of the number of registered voters was actually a higher requirement than Ohio's formula of 15% of the last gubernatorial vote. Shown below are the number of signatures required by Georgia's actual 5% law, and also the hypothetical number of signatures that would have been required, if Georgia had had Ohio's law, 15% of the last gubernatorial vote[26]:

Year	*Actual Georgia requirement*	*Hypothetical requirement, 15% gub. vote*
1944	27,500 (estimate)	9,436
1946	23,500 (estimate)	9,436
1948	28,134	24,224
1950	53,898	24,224
1952	60,087	35,165
1954	61,459	35,165
1956	64,981	51,756
1958	63,690	51,756
1960	65,530	25,275

[26] Based on official Georgia registration and election returns data, from the Secretary of State.

1962	64,302	25,275
1964	65,107	49,802
1966	68,250	49,802
1968	83,339	146,253
1970	88,175	146,253

Fifteen percent of the last gubernatorial vote would actually have been a less severe standard, in all the years that Georgia's actual requirement had existed, except for 1968 and 1970.[27] Justice Harry Blackmun, at the oral argument in *Jenness*, was shrewd enough to ask for this comparison. He said, "Mr. Rindskopf, as I remember in *Williams v Rhodes* the figure was 15% of actual votes cast; and here it is 5% of the registered voters. Which is the more difficult of the two provisions to meet?"

Unfortunately, the attorney for the Socialist Workers Party wasted a valuable opportunity to tell the Court that, for most of the law's history, 5% of the registered voters was more difficult than 15% of the last gubernatorial vote. Instead, he said, "In Georgia the number of voters is generally about 50% of the number of registered voters, or it has been in the last two gubernatorial elections." His own answer sabotaged his own case. He ignored all of the history that would have helped him win the case, and mentioned only the two most recent elections, which are the only two instances that helped the state.

[27] Georgia required signatures based on the number of registered voters, in the year that particular office had last been filled at an election. Therefore, gubernatorial and presidential petition requirements looked back 4 years, since those offices have 4-year terms.

He also failed to remind the Court that the Ohio laws, invalidated in *Williams v Rhodes,* included a provision that was clearly easier than Georgia's 5% requirement. As mentioned above, Ohio laws between 1951 and 1968 permitted an independent candidate (for office other than president) to get on the ballot with a petition of 7% of the last gubernatorial vote.[28] All of the Ohio ballot access laws, both the new party and the independent candidate procedures, were struck down by the Court in *Williams v Rhodes.* Yet, ironically, under the 7% of the last gubernatorial vote struck down in the Ohio case, Linda Jenness could have got on the Georgia ballot for Governor in 1970 as an independent candidate, with 68,252 signatures. This is less than the 88,175 that she was actually required to get. Furthermore, any adult resident of Georgia could have signed for her, if the Ohio laws had existed in Georgia. Ohio, at the time, didn't require signers of new party or independent candidate petitions to be registered voters.[29] Also, unlike Georgia's actual law, any person could have circulated her petition. And she could have started her petition as early as she wished.

Ironically, in 1969 the Ohio legislature had reduced the party petition from 15% to 7%, had reduced the independent petition from 7% to 4%; and had provided for independent presidential candidates. Yet even

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[28] See Ohio State Session Laws, 1951, Senate Bill 269 sub, p. 673. The 7% petition was successfully used by independent congressman Frazier Reams in 1952 and 1954. He was reelected in 1952, but defeated in 1954.

[29] See page 5 of the official Supreme Court transcript of *Williams v Rhodes.*

these new requirements had been declared unconstitutional by a three-judge U.S. District Court in July, 1970.[30] Ohio replaced them with 5,000 signatures for statewide independents (one-eighth of 1% of the number of registered voters) and 1% of the last gubernatorial vote, for new parties.

Jenness is a short decision; it is only 11 pages long. Yet, it used all of pages 436 and 437, and part of page 438, to quote from *Williams v Rhodes* about the difficulties of the Ohio new party law. Clearly, the *Jenness* Court felt it was important to show that the Georgia laws were easier than the Ohio laws. Yet, the *Jenness* decision fails to mention that the Ohio election code contained a procedure (the independent procedure, 7% of the last gubernatorial vote) that would have required fewer signatures (if an identical law had existed in Georgia), with easier circulation procedures, than actually existed in Georgia.

To summarize, Linda Jenness would have had an easier time getting on the ballot for Governor of Georgia in 1970 if the Ohio laws in existence between 1951 and 1968 had existed in Georgia in 1970. She would have needed 68,252 signatures, not the 88,175 she was actually required to get. Yet the Court had invalidated that easier Ohio independent law in 1968, and was now upholding the more severe law in Georgia in 1971.

The *Jenness* comparison with Ohio and Georgia laws contained another untrue statement. *Jenness*

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[30] *Socialist Labor Party v Rhodes II*, 318 F Supp 1262 (S.D.Oh. 1970).

says, "Unlike Ohio, Georgia freely provides for write-in votes" (page 438). However, Ohio had been told by a U.S. District Court in August, 1968, that it must provide for write-in votes, and it had not appealed that decision.[31] Therefore, when Ohio's ballot access case had reached the U.S. Supreme Court in *Williams v Rhodes* in October, 1968, it was no longer true that Ohio banned write-in votes.

3. Did the Georgia procedures violate the equal protection clause?

Equal protection for candidates. The *Jenness* decision said that the Georgia ballot access laws did not violate the Equal Protection Clause of the 14th amendment as to candidates. Page 440 says that Socialist Workers Party candidates face a petition barrier, but that Democratic and Republican individuals running for public office (who didn't need to petition, provided their party held a primary) faced the equally daunting barrier of winning their party's nomination.

This article will not attempt an Equal Protection critique of the Supreme Court's logic in *Jenness*. However, it will mention that the Court, in discussing the burdens on major party candidates on the one hand, versus the burden on Socialist Workers Party candidates on the other hand, seemed to forget that individuals seeking the Socialist Workers Party nomination also had to face the barrier of persuading their party to nominate them. The Court seemed to feel that only Republican and Democratic individuals

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[31] *Socialist Labor Party v Rhodes*, 290 F Supp 983 (S.D.Oh. 1968).

faced the challenge of winning their own party's nomination. Anyone who read newspapers during the spring and summer of 2000 may remember the intense fight that Patrick Buchanan had to wage, to win the Reform Party's presidential nomination, over the opposition of party founder Ross Perot. Minor party nominations, like major party nominations, are not always easily obtained.

Equal protection for parties. The *Jenness* decision also weighed whether the Georgia laws denied Equal Protection to the Socialist Workers Party, vis-à-vis the Republican and Democratic Parties (p. 441). Again, this article will not critique the Court's Equal Protection analysis, except to point out that the Court omitted a key fact. It said that whereas the Socialist Workers Party was burdened with mandatory petitions, the major parties were burdened with the need to conduct a primary election. However, as the District Court decision in this case had pointed out,[32] the Georgia law had changed after the case had been filed. A 1970 law[33] had provided that parties need no longer pay for the administration of their own primaries. Instead, the county governments would pay the expenses of primary administration. Since the Supreme Court used the fact that the state required parties to hold primaries, in its Equal Protection Analysis, it should have mentioned that Georgia had recently lifted the financial burden.

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[32] *Georgia Socialist Workers Party v Fortson*, 315 F Supp 1035 (N.D.Ga. 1970), at p. 1036.

[33] Georgia State Session Laws, 1970, Ch. 1079, p. 347.

4. Are harsh ballot access laws required in order to prevent voter confusion?

Jenness only has one sentence to explain the state interest in Georgia-style ballot access laws. "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process" (p. 442, in the final paragraph of the decision).

There was no discussion of voter confusion in any of the briefs in the case, nor at oral argument. The irony is that Georgia gubernatorial elections between 1944 and 1962 all had just one candidate on the general election ballot, and the overwhelming majority of Georgia congressional and legislative elections in those years had also been one-candidate elections. One would think that one-candidate elections would be an obvious source of concern to the Court. No mention of one-candidate elections is found in the decision. Instead, the Court used the hypothetical problem of "voter confusion" to justify its opinion.

Certainly, voters would be confused if they were presented with a very lengthy list of candidates. But a petition of Georgia's severity has never been required, to prevent a very lengthy list of candidates. In all U.S. history, there has never been a government-printed general election ballot, for a partisan statewide office,

with more than eight candidates on the ballot, if a state required as many as 5,000 signatures.[34]

In the November 2000 presidential election, there were ten presidential candidates on the Florida ballot. Some people believe that the presence of ten presidential candidates contributed to voter confusion. The only Florida requirements for a minor party to place its presidential candidate on the 2000 ballot were that it submit a list of its state officers, and a list of 25 presidential elector candidates who were party members, and certify that it had held a national presidential nominating convention.[35] No petition or fee was required. Therefore, even should it be determined that ten candidates, of itself, contributed to voter confusion in Florida, this is no justification for the type of law upheld in *Jenness,* which generally meant that no minor party or independents appeared on the ballot.

Furthermore, the presence of ten candidates on the Florida ballot only seemed to cause voter confusion in Palm Beach County, home of the famous "butterfly

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[34] 244 34 See *Ballot Access News,* Sep. 1, 2001, p. 4, for a chart showing the most crowded statewide partisan general election ballot in each state's history. *www.Ballot- Access.org*. The chart also shows the petition requirement for minor party or independent candidates for the cited instance. If a state required at least 5,000 signatures, it never had more than 8 candidates on the ballot. The only exception is New York. That is only because New York permits "fusion" and there have been instances at which two or three candidates were listed on multiple lines on the ballot (resulting in up to 12 names for a particular office), at a time when New York required 15,000 signatures.

[35] See Florida Election law, sections 97.021(13) and 103.021(4).

ballot." There were 10 presidential candidates on the ballot in Vermont, Rhode Island, Washington and Colorado, and there were no reports of voter confusion from those states.[36]

The decision also says, "In the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries" (p. 440). The reference is to the 1970 gubernatorial primaries, at which 9 candidates ran for the Democratic nomination, and 3 ran for the Republican nomination. The Democratic primary resulted in a win for State Senator Jimmy Carter. Carter, of course, is modern-day Georgia's most renowned governor. He brought honor to his state and his region by being the first person from the Deep South to be elected president since 1848. If the presence of nine candidates on the ballot for a single office is deemed to cause voter confusion, surely it is the Democratic primary ballots in Georgia, not one-candidate or (more recently) two-candidate general election ballots, that cause voter confusion. Yet the 1970 Democratic gubernatorial primary seems to have been free of voter confusion.

At oral argument, the attorney for the Socialist Workers Party told the Court that Georgia had permitted any minor party to place candidates on the general election ballot, with no petition and no fee, in the years before 1943.[37] One Justice asked a

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[36] See *America Votes 24*, by Richard Scammon (CQ Press, Washington, D.C., 2001).

[37] Official transcript, pp. 32–33.

perfunctory clarifying question, but otherwise, no one seemed to react to the surprising news that Georgia had managed to function before 1943 with no petition requirements for minor party and independent candidates. No one asked if Georgia had crowded ballots before 1943. If the question had been asked, the correct answer would have been that Georgia had never had a statewide partisan general election ballot with more than six candidates.[38]

5. Are harsh ballot access laws needed to prevent deception?

As noted above, the Court cited the need to prevent "deception" as a justification for Georgia- style ballot access laws. What did the Court mean?

A clue is provided by the transcript of the oral argument. While the attorney for the state was before the Court, Chief Justice Warren Burger asked this question: "I'm thinking of the case in Nebraska when Senator George Norris was up for re-election and there was a great effort to defeat him which I think, if I recall the history, succeeded, and one of the mechanisms was to find a man by the name of George Norris and put him on the ballot too, obviously, to divide the vote."

Burger was both correct and incorrect. There was such an attempt, but it was made in the Republican primary of 1930, not in any general election. Senator

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[38] Georgia's most crowded partisan general election statewide ballot was in 1936, when there were six presidential candidates listed.

Norris's autobiography[39] tells how his opponents tried to qualify another person named "George W. Norris" at the Republican primary. Under Nebraska election law, candidates in a primary could have no identifying information on primary ballots, other than their names. Two persons with the same name at a Nebraska primary would have sabotaged the primary election. Fortunately, the bogus Norris failed to qualify for the primary because his declaration of candidacy was filed one day too late. The "dirty trick" of qualifying a bogus candidate is obviously much more dangerous in a primary than it is in a general election. A bogus candidate who qualified as an independent candidate, would have had "independent" next to his or her name, whereas the true Senator Norris would have had "Republican" next to his name on the November ballot.[40]

Although such "dirty tricks" are a danger, the solution is to provide for additional descriptive material on ballots, in cases of two candidates with similar names. The Norris incident cannot logically be used to support laws that make it virtually impossible for independent or minor party candidates to get on the ballot.

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[39] *Fighting Liberal, the Autobiography of George W. Norris* (N.Y.: Macmillan, 1945), p. 292ff.

[40] Ironically, Norris left the Republican Party in 1936 and was reelected as an independent. He was defeated in 1942 when he tried for another term as an independent.

6. Are harsh ballot access laws needed to prevent frustration of the democratic process?

Jenness was written by Justice Potter Stewart. Although he didn't explain what he meant by "frustration of the democratic process," he probably meant that if there are three candidates on the ballot, and no one gets a majority, perhaps the result might have been different if there had been only two candidates on the ballot. Stewart had dissented in *Williams v Rhodes,* and this fear had been his objection to letting Governor George Wallace on the Ohio ballot. Of course, historians don't even agree as to whether most Wallace voters would have been more likely to vote for Hubert Humphrey or Richard Nixon, if Wallace had been kept off the ballot. A clearer example is provided in the 2000 election, when most people assume that most of the Nader voters would have voted for Gore, if Nader had been kept off the ballot.

Justice John M. Harlan had rebutted Stewart in his concurrence in *Williams v Rhodes.* Harlan had pointed out that if a state was concerned that the presence of a third candidate on the ballot might cause the outcome to be different than it would have been with only two candidates on the ballot, there were solutions. A state could provide for a run-off general election (in fact, Georgia since 1964 has provided for run-off general elections if no one gets a specified percentage of the vote in the first general election). Or, Harlan said, a state could provide for "single transferable voting," now commonly called "instant- runoff voting."

Another answer to Stewart's point, is to recognize the sovereignty of voters. A voter who chose to vote for

Nader in the 2000 election, understood that his vote was thereby not helping Al Gore. But if the voters are sovereign, what right does the government have to tell any voter that he or she may not vote for a candidate like Nader? The right to vote includes the right of choice for whom to vote. The right to vote is meaningless, without free choice. In 1964 the Supreme Court said, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.[41]

The note in *U.S. Reports* says, "Stewart, J., delivered the opinion of the Court, in which Burger, C.J., and Douglas, Brennan, White, Marshall, and Blackmun, JJ., joined. Black and Harlan, JJ., concurred in the result." It is unusual that two justices did not sign the decision, yet neither did they did write separately. Justice Black had written *Williams v Rhodes*, and Justice Harlan had written separately in *Williams v Rhodes,* agreeing that the Ohio laws challenged by George Wallace were unconstitutional. Their failure to sign *Jenness v Fortson* hints that they were uneasy with it. When *Jenness* was decided, both justices were only days away from retiring from the Court.

When the decision came out, it got little attention. The *New York Times* only devoted one sentence to the decision.

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[41] *Reynolds v Sims*, 377 U.S. 533, 555 (1964).

JENNESS V. FORTSON'S INFLUENCE: LARGE SIGNATURE REQUIREMENTS

Despite the small amount of public attention paid to the decision, it had a big policy influence. In 1974, the Oklahoma legislature increased the petition requirement for new parties from 5,000 signatures, to 5% of the last vote cast for president or governor. This was immediately an eightfold increase in presidential election years, and an 11-fold increase in midterm years. Yet Oklahoma had not had crowded ballots in the past; there had never been an election in Oklahoma history with more than five parties on the ballot. As a result of the 1974 legislative change, no party other than the Democratic or Republican Parties has ever since appeared on the Oklahoma ballot in a mid-term year. Yet the new law was upheld twice by the 10th circuit.[42] The court did not discuss the evidence presented in those cases; they merely cited *Jenness*. The results are that Oklahoma voters were unable to vote for Ralph Nader in both 2000 and 1996; nor were they able to vote for various other minor party presidential candidates who did appear on the ballot of most states, in elections 1976 through 2000. The problem is likely to continue to exist indefinitely, since no reform bill has ever made the slightest headway in the Oklahoma legislature.

Indiana's legislature increased the petition requirement in 1980 from one-half of 1% of the last vote cast, to 2% of the last vote cast, even though

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[42] *Arutunoff v Oklahoma Election Board*, 687 F 2d 1375 (1982) and *Rainbow Coalition of Oklahoma v Oklahoma State Election Board*, 844 F 2d 740 (1988).

under the old standard, Indiana had never had more than eight candidates on the statewide general election for any office. The new law didn't take effect until 1983. The motivation for the change, according to political observers in Indiana at the time, was that one particular powerful state legislator had been offended that a particular candidate had qualified as an independent candidate for Mayor of Gary, Indiana, in 1979 (all city elections in Indiana are partisan).

As was the case in Oklahoma, the change prevented many minor party presidential candidates, even those who were on the ballot in most states, from appearing on the Indiana ballot. Ralph Nader failed to appear in Indiana in both 1996 and 2000. Another candidate who had been excluded earlier, 1984 Communist nominee Gus Hall, filed a lawsuit against the new law.[43] Although the U.S. District Court and the 7th circuit upheld the law, the 7th circuit took cognizance of Hall's evidence that the new law was not necessary. Judge Richard Posner wrote a lively decision, upholding the Indiana law, but noting, "If a strict standard were applied to this case, Indiana would be in trouble. . . It seems apparent that the courts do not actually subject ballot-access regulations to the same stringent review to which they subject racial discrimination and regulations of the content of political communications, to give just two examples of strict review. . . We must follow what the Supreme Court does, not just what it says."

In 1983, North Carolina increased the petition requirement for new parties from 5,000 signatures, to

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[43] *Hall v Simcox,* 766 F 2d 1171 (7th Cir., 1985).

2% of the last gubernatorial vote, an eightfold increase at the time. North Carolina had never had a statewide general election with more than six candidates on a governmentprinted ballot. As a result of the change, Ralph Nader failed to appear on the North Carolina ballot in both 1996 and 2000. However, the 4th circuit has upheld the new law in two separate decisions.[44] The Court seemed to take little notice of any evidence, merely citing *Jenness*.

The motivation for the North Carolina change seems to have been that, in 1980, a Marxist political party had qualified in the state for the first time in history.[45] The Socialist Workers Party managed to obtain the required 10,000 signatures that year (North Carolina had required 10,000 signatures since the start of government-printed ballots). In 1981, the legislature had lowered the requirement to 5,000 signatures, but had provided that new party petitions were to carry bold-faced type, saying that the voter registration records would be changed for anyone who signed. The act of signing, would result in the voter's registration record changed to show the signer as a member of the party whose petition had been signed. Legislators believed that this change would discourage most people from signing for the Socialist Workers Party in the future. However, the 1981 law was

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[44] *McLaughlin v North Carolina State Board of Elections*, 65 F 3d 1215 (1995) and *Nader 2000 Primary Committee v Bartlett*, unreported, order of Sep. 15, 2000, no. 00-2040.

[45] Neither the Communist Party, nor any of its statewide candidates, ever appeared on the ballot in North Carolina. This was also true for Louisiana, South Carolina, Mississippi, Nevada, Alaska, and Hawaii.

invalidated.[46] Therefore, in 1983, the legislature "got even" by increasing the number of signatures to a number that was higher than 40,000 at the time, and is today almost 60,000, due to population growth. The 1983 law achieved what the 1981 law had intended; the Socialist Workers Party never again tried to petition in the state.

In 1995, the Alabama legislature quintupled the number of signatures for new parties and independent candidates, from 1% of the last gubernatorial vote, to 5%.[47] The Governor exercised his authority to alter a bill, and set the requirement at 3%. According to political observers, the legislature's motivation was anger that the Patriot Party[48] in 1994 had nominated a candidate for county office, who had already lost that year's Democratic primary (the state was free to ban such "sore-loser" candidacies, but, strangely enough, it did not do so). The Patriot Party candidate had gone on to win the November 1994 election.

The petition change could not be justified on grounds of keeping the ballot uncrowded, since the state had required petitions of 1%, no more than four

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[46] *North Carolina Socialist Workers Party v North Carolina Board of Elections,* 538 F Supp 864 (E.D.N.C. 1982).

[47] However, the legislature created an exception for independent presidential candidates, who continue to need only 5,000 signatures.

[48] The Patriot Party had been formed in 1994 by supporters of Ross Perot, prior to Perot himself founding the Reform Party in 1995.

political parties had ever appeared on the ballot.[49] The change caused an increase, from approximately 13,000 signatures, to approximately 39,000 signatures. In the years since the change, only one petition to create a new political party, and no petition to qualify a statewide independent candidate, has been successful.

In 1999, the West Virginia legislature doubled the number of signatures, from 1% of the last vote cast for that office, to 2%. The change was especially serious in West Virginia, since the law already provided that petitioners must tell potential signers that if they sign, they can't vote in the upcoming primary. Under the old law, the state had never had more than six candidates on the statewide general election ballot for any office. According to observers of West Virginia politics, the change had been made to forestall ballot placement for the newly created Mountain Party, which wished to outlaw strip mining. In 2000, a U.S. District Court issued an injunction[50] against applying the new law for the year 2000, on due process grounds (the law had interfered with petitions that had already started circulating). However, nothing in the court order prevents the state from applying the requirement to elections after 2000.

Jenness has thus made it possible for state legislators to cripple minor parties and independent

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[49] The 1% petition had been created in 1982. Previously, Alabama had not required any signatures for a new party to qualify for the ballot, in its entire history, except for the years 1972–1976 when 5,000 were required.

[50] *Nader 2000 Primary Committee v Hechler,* not reported, order of Sep. 15, 2000, no. 2:00-0839.

candidacies. State legislatures have been free to raise the petition requirements up to 5% of the number of registered voters, knowing that the Courts will not interfere. *Jenness* has also made it difficult for old laws, which were in effect before *Jenness,* to be overturned. New York requires congressional district petitions, for primary ballot access, to be signed by 5% of the party's registered members, or 1,250 signatures, whichever is less. In New York, Republican presidential primary ballot access involves circulating a petition for Delegates to the National Convention, from various congressional districts. In 1996, there was a great deal of publicity about ballot access for leading Republican presidential candidates, in the New York presidential primary. Only Bob Dole was able to qualify, across the whole state. His opponents could not successfully comply with the requirement. A U.S. District Court issued an injunction against the law, but the 2nd circuit, citing *Jenness,* upheld the law[51] and reversed the District Court. Although certain procedural technicalities were later invalidated in New York, the 5% formula continues to exist in the law.

In Georgia itself, the legislature voluntarily lowered the statewide minor party and independent petition requirement for statewide office, but the legislature has never amended the 5% formula for district or county office. As a consequence, no minor party or independent candidate for the U.S. House has been able to comply with the 5% petition, since 1964.[52]

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[51] *Rockefeller v Powers,* 74 F 3d 1367 (1996).

[52] An independent candidate, state Rep. Billy McKinney, did qualify for the U.S. House in 1982 in Atlanta. However, his success was only possible because a federal court had reduced the

Other severe ballot access requirements, which are virtually immune from judicial challenge even though they are seldom used, are: (1) the Arkansas new party petition of 3% of the last gubernatorial vote, which has been used only once; (2) the 3% California independent candidate petition for district office, which has only been used four times for Congress since it was created in 1976; (3) the Illinois new party and independent candidate 5% petition for district office; (4) the Kansas independent candidate 4% petition for district office; (5) the Louisiana new party registration requirement of 5%, which has never been used; (6) the Maine new party petition of 5%, which has only been used once; and (7) the Tennessee new party 2.5% petition, which has never been used.

OTHER INFLUENCES OF *JENNESS V. FORTSON*

Jenness has also had an impact on petition deadlines. The plaintiffs in *Jenness* did not complain about the June petition deadline. But since the Court mentioned it, and seemed to find no fault with it, some lower courts have cited *Jenness* to uphold May and June petition deadlines, in New Jersey, Virginia, and West Virginia.[53] This has occurred, even though Justice John Paul Stevens wrote separately in *Mandel*

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signature requirement to less than onethird of the standard requirement, on the grounds that, because redistricting was so late, the normal petitioning period has shrunk to less than one-third of the standard 6-month petitioning period.

[53] *Council of Alternative Political Parties v Hooks*, 179 F 3d 64 (3rd Cir., 1999); *Wood v Meadows*, 207 F 3d 708 (4th Cir., 2000); *Socialist Workers Party v Hechler*, 890 F 2d 1303 (4th Cir., 1989).

v Bradley,[54] to say that *Jenness* should not be used as a precedent to uphold early petition deadlines, since the deadline issue was not really before the Court in *Jenness*.

Jenness has also been used to uphold very strict definitions of "political party." Again, the plaintiffs in *Jenness* did not complain about the 20% vote test of "political party" in Georgia. Yet, because the Court mentioned this definition and seemed to find no fault with it, every federal court that has weighed a restrictive definition of "political party" has always upheld it. Such cases have occurred in Alabama (20% vote for any statewide office),[55] Colorado (10% vote for Governor),[56] Louisiana (5% vote for president, or registration of 5%),[57] North Carolina (10% vote for President or Governor),[58] Oklahoma (10% vote for President or Governor),[59] and Pennsylvania (15% registration membership).[60]

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[54] 432 US 179 (1977).

[55] *Libertarian Party of Alabama v Wallace*, 586 F Supp 399 (M.D.1984)

[56] *Baer v Meyer*, 728 F 2d 471 (10th Cir., 1984)

[57] *Dart v Brown*, 717 F 2d 1491 (5th Cir., 1983)

[58] *McLaughlin v North Carolina State Board of Elections*, 65 F 3d 1215 (4th Cir., 1995)

[59] *Arutunoff v Oklahoma Election Board*, 687 F 2d 1375 (10th Cir., 1982)

[60] *Patriot Party v Mitchell*, 826 F Supp 926 (E.D.1993)

Jenness has even been cited to uphold laws which harm minor parties, but which do not relate to ballot access. For example, a New Hampshire law, providing that only members of the two largest parties could be local election officials, was upheld by the First Circuit, which cited *Jenness*.[61] The Supreme Court itself cited *Jenness* in *Buckley v Valeo,* 424 US 1 (1976), to uphold a law providing that new political parties can never qualify for general election presidential funding during the campaign, no matter how much support they enjoy (though if they poll over 5%, they may get some funding after the election is over).

In conclusion, *Jenness* is a short decision, little-noticed at the time it was issued, and deeply flawed. Yet it has been the mainstay of judicial decisions ever since, which have prevented minor parties and independent candidates from enjoying the "level playing field" that American constitutional ideals should protect.

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[61] *Werme v Merrill,* 84 F 3d 479 (1st Cir., 1996)

APPENDIX: LOWER COURT OPINIONS THAT HAVE UPHELD RESTRICTIVE BALLOT ACCESS LAWS, CITING *JENNESS*

1. *Alabama:* Libertarian Party of Alabama v Wallace, 586 F Supp 399 (M.D., 1984)

2. *Arizona:* Kannarr v Hardy, 575 P 2d 1250 (1978)

3. Winn v State, 757 P 2d 111 (Az App, 1988)

4. *Arkansas*: Carruth v Bumpers (US Dist Ct, E.D., LR72-c-211, dec. of Oct. 20, 1972)

5. Rock v Bryant, 459 F Supp 64 (E.D.1978)

6. Christian Populist Party v Secretary of State, 650 F Supp 1205 (1987)

7. Langguth v McKuen, 30 F 3d (8th cir., 1993)

8. *California:* Hall v Brown (US Dist Ct, N.D., c72-1468, dec. of Sep. 8, 1972)

9. Socialist Workers Party v Eu (US Dist Ct, N.D., c72-1468, dec. of June 7, 1976)

10. Bill v Williams, 70 Cal App 3d 531 (1977)

11. Cross v Eu, 430 F Supp 1036 (N.D., 1977)

12. Kellam v Eu, 83 Cal App 3d 463 (1978)

13. Libertarian Party of California v Eu, 620 P 2d 612 (Cal Supreme Ct, 1980)

14. Fridley v Eu, 131 Cal App 3d 100 (1982)

15. Dellums v Riggs (US Dist Ct, N.D., c82- 3703-SC, dec. of Mar. 4, 1983)

16. Andress v Reed, 880 F 2d 239 (9th cir., 1989)

17. Lightfoot v Eu, 964 F 2d 865 (9th cir., 1992)

18. *Colorado:* Thournir v Meyer, 708 F Supp 1183 (1989)

19. Baer v Meyer, 728 F 2d 471 (10th cir., 1984)

20. National Prohibition Party v State, 752 P 2d 80 (Colo Supreme Court, 1988)

21. *Connecticut:* Fishman v Schaffer, 418 F Supp 613 (1976)

22. LaRouche v Kezer, 990 F 2d 36 (2nd cir., 1993)

23. *Delaware:* Commoner v Dupont, 501 F Supp 778 (1980)

24. *Florida:* American Party of Fla v Askew (US Dist Ct, N.D., TCA-1861, dec. of Oct. 5, 1972)

25. Kirk v Smathers (US Dist Ct, N.D., TCA 78-0815, dec. of June 8, 1978)

26. Wilson v Firestone, 623 F 2d 345 (5th cir., 1980)

27. Libertarian Party of Florida v State of Florida, 710 F 2d 790 (11th cir., 1983)

28. Geison v State of Florida, 770 F 2d 174 (11th cir., 1985)

29. Sponable v Graham (US Dist Ct., M.D., 84-1002-civ-T-13, dec. of Jan. 24, 1985)

30. Coonan v Smith (US Dist Ct., S.D., 89- 1232-cv-LCN, dec. of June 16, 1989)

31. U.S.Taxpayers Party of Fla. V Smith, 871 F Supp 426 (1993)

32. Simpson v Smith (11th cir., 94-3123, dec. of Apr. 28, 1995)

33. Libertarian Party of Florida v Smith, 660 So 2d 807 (1995)

34. Reform Party of Florida v Mortham (US Dist Ct., N.D., 4:97cv347-RH, dec. of Nov. 21, 1997)

35. *Georgia:* Connor v Fortson (US Dist Ct, N.D., civ 17057, dec. of Oct. 17, 1972)

36. Mathews v Little, 498 F 2d 1068 (5th cir., 1974)

37. Ashworth v Fortsn, 424 F Supp 1178 (N.D. 1976)

38. American Independent Party v Fortson (US Dist Ct., N.D., C76-1530A, dec. of Oct. 18, 1976)

39. American Party v Fortson (US Dist Ct, N.D., cv 78-610A, dec. of May 10, 1978)

40. Anderson v Poythress, 271 SE 2d 834 (Ga. Supreme Ct., 1980)

41. Belluso v Poythress, 485 F Supp 904 (N.D., 1980)

42. McCrary v Fortson, 638 F 2d 1308 (5th cir., 1981)

43. Libertarian Party of Georgia v Cleveland (US Dist Ct., N.D., 1:94-cv-1503-CC, dec. of June 28, 1994)

44. Natural Law Party of Georgia v Massey (US Dist Ct., N.D., 1:96-cv-2524-cc, dec. of Oct. 17, 1996)

45. Amendola v Miller (11th cir., 97-8888, dec. of Oct. 1, 1998)

46. *Hawaii:* Nachtwey v Doi, 583 P 2d 955 (Hi. Supreme Court, 1978)

47. Hustace v Doi, 588 P 2d 915 (Hi. Supreme Court, 1978)

48. Erum v Cayetano, 881 F 2d 689 (9th cir., 1989)

49. *Idaho*: Nader 2000 v Cenarrusa (US Dist Ct., civ 00-503, dec. of Sep. 18, 2000)

50. *Illinois:* Bowe v Board of Election Cmsrs of City of Chicago, 614 F 2d 1147 (7th cir., 1980)

51. Stevenson v State Board of Elections, 638 F Supp 547 (N.D., 1986)

52. Fuller v Kasper, 491 NE 2d 87 (Ill app, 1986)

53. Black v Cook Co. Officers Electoral Board, 750 F Supp 901 (N.D., 1990)

54. Libertarian Party of Illinois v Rednour, 108 F 3d 768 (7th cir., 1997)

55. *Indiana:* Udall v Bowen, 419 F Supp 746 (S.D., 1976)

56. Populist Party v Orr, 595 F Supp 760 (S.D., 1984)

57. Hall v Simcox, 766 F 2d 1171 (7th cir., 1985)

58. *Kansas:* Hagelin for President Committee v Graves, 25 F 3d 956 (10th cir., 1994)

59. *Kentucky:* Anderson v Mills, 664 F 2d 600 (6th cir., 1981)

60. *Louisiana:* Dart v Brown, 717 F 2d 1491 (5th cir., 1983)

61. *Maine:* Libertarian Party of Maine v Diamond, 992 F 2d 365 (1st cir., 1993)

62. Maine Green Party v Secretary of State (US Dist Ct., 96-261-B-C, dec. of Dec. 24, 1997)

63. *Maryland:*Auerbach v Mandel (US Dist Ct, civ 72-141-N, dec. of March 23, 1972)

64. Mathers v Morris, 515 F Supp 931 (1981)

65. Ahmad v Raynor, 862 F 2d 313 (4th cir., 1988)

66. *Massachusetts:* Baird v Davorem, 346 F Supp 515 (1972)

67. Socialist Workers Party v Davorem, 378 F Supp 1245 (1974)

68. LaRouche v Guzzi, 417 F Supp 444 (1976)

69. Independent Voters Party v Connolly (US Dist Ct., 92-11788-S, dec. of July 23, 1992)

70. *Michigan:* Communist Party v Austin, 362 F Supp 27 (E.D., 1973)

71. Hudler v Austin, 419 F Supp 1002 (E.D., 1976)

72. Griswold v Austin (US Dist Ct., civ 80- 73215, dec. of Aug. 29, 1980)

73. DeBerry v Austin (US Dist Ct., civ 80- 73261, dec. of Sep. 4, 1980)

74. *Missouri:* Libertarian Party of Missouri v Bond, 764 F 2d 538 (8th cir., 1985)

75. Manifold v Blunt, 863 F 2d 1368 (8th cir., 1988)

76. *Montana:* Fulani v Cooney (US Dist Ct., cv 92-60-H-CCL, dec. of Oct. 6, 1992)

77. *New Hampshire:* Werme v Merrill, 84 F 3d 479 (1996)

78. *New Jersey:* Mammon v Schatzman, 472 F 2d 114 (3rd cir., 1972)

79. Council of Alternative Political Parties v Hooks, 179 F 3d 64 (3rd cir., 1999)

80. *New Mexico:* Peoples Constitutional Party v Evans, 491 P 2d 520 (NM Supreme Court, 1971)

81. Dillon v King, 529 P 2d 745 (NM Supreme Court, 1974)

82. Dillon v Evans, 549 F 2d 183 (10th cir., 1977)

83. *New York:* Bennett v Lomenzo (US Dist Ct., E.D., 72-C-1252, dec. of Oct. 6, 1972)

84. Moritt v Rockefeller, 346 F Supp 34 (S.D., 1972)

85. Berger v Acito, 457 F Supp 296 (S.D., 1978)

86. Johnson v Cuomo, 595 F Supp 1126 (N.D., 1984)

87. Hewes v Abrams, 718 F Supp 163 (S.D., 1989)

88. Schultz v Williams, 44 F 3d 48 (2nd cir., 1994)

89. Rockefeller v Powers I, 74 F 3d 1367 (2nd cir., 1996)

90. Prestia v O'Connor, 178 F 3d 86 (2nd cir., 1999)

91. *North Carolina:* McLaughlin v No.C. State Board of Elections, 65 F 3d 1215 (4th cir., 1995)

92. Nader 2000 Primary Committee v Bartlett (US Dist Ct., E.D., 5:00-cv-348-BR, dec. of Aug. 9, 2000)

93. *North Dakota:* McLain v Meier II, 851 F 2d 1045 (8th cir., 1988)

94. McLain v Meier III (US Dist Ct., A1-88- 230, dec. of Oct. 25, 1988)

95. *Ohio:* Sadlak v Gilligan (US Dist Ct., N.D., C74-191Y, dec. of Oct. 25, 1974)

96. Sadlak v Rhodes (6th cir., 82-3157, dec. of Oct. 15, 1982)

97. Miller v Lorain Co. Board of Elections, 141 F 3d 252 (6th cir., 1998)

98. Schrader v Blackwell, 241 F 3d 783 (6th cir., 2001)

99. *Oklahoma:* Arutunoff v Oklahoma Election Board, 687 F 2d 1375 (10th cir., 1982)

100. Rainbow Coalition of Oklahoma v Oklahoma State Election Board, 844 F 2d 740 (10th cir., 1988)

101. Nat. Comm. US Taxpayers Party v Okla. Election Bd. (US Dist Ct., W.D., civ-96-343- A, dec. July 24, 1996)

102. *Oregon:* Libertarian Party of Oregon v Paulus (US Dist Ct., 82-521FR, dec. of Sep. 3, 1982)

103. Libertarian Party of Oregon v Roberts, 750 P 2d 1147 (Ore. Supreme Court, 1988)

104. *Pennsylvania:* Peoples Party v Tucker, 347 F Supp 1 (M.D., 1972)

105. Williams v Tucker, 382 F Supp 381 (M.D., 1974)

106. Perry v Grant, 775 F Supp 821 (M.D., 1991)

107. Patriot Party v Mitchell, 826 F Supp 926 (E.D., 1993)

108. Trinsey v Mitchell, 851 F Supp 167 (E.D., 1994)

109. Petition of Berg, 712 A 2d 340 (Pa. Commonwealth, 1998)

110. *Tennessee:* Tennessee Libertarian Party v Democratic Party, 555 SW 2d 102 (Tenn. Supreme Ct., 1977)

111. *Texas:* Godwin v Dies (US Dist Ct, data missing but will be supplied, 1971)

112. *Texas:* Raza Unida Party v Bullock, 349 F Supp 1272 (W.D., 1972)

113. Holmes v Gonzales (US Dist Ct., W.D., A98ca-600-SS, dec. of Sep. 21, 1999)

114. *Utah:* Zautra v Miller, 348 F Supp 847 (1972)

115. LaRouche v Monson, 599 F Supp 621 (1984)

116. *Virginia:* Libertarian Party of Virginia v Davis, 766 F 2d 865 (4th cir., 1985)

117. Richards v Robb (US Dist Ct, E.D., 84-580- R, dec. of Oct. 2, 1984)

118. Wood v Meadows, 207 F 3d 708 (4th cir., 2000)

119. Wood v Quinn, 104 F Supp 2d 611 (W.D., 2000)

120. *Washington:* McCauley v Hordyk (US Dist Ct., W.D., C87-1270M, dec. of Oct. 15, 1987)

121. Libertarian Party of Washington v Munro, 31 F 3d 759 (9th cir., 1994)

122. *West Virginia:* Harless v McCartney (US Dist Ct, S.D., 76-293-CH, dec. of July 16, 1976)

123. W.Va. Libertarian Party v Manchin, 270 SE 2d 634 (W.V. Supreme Court, 1980)

124. Socialist Workers Party v Hechler, 890 F 2d 1303 (4th cir., 1989)

125. *Wyoming:* Populist Party v Herschler, 746 F 2d 656 (10th cir., 1984)

126. Spiegel v State of Wyoming (US Dist Ct., 96-cv-1028B, dec. of July 1, 1996)

All of these decisions involved minor parties or independent candidates except that some of the New York plaintiffs included Republican or Democratic candidates seeking primary ballot access.

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